No. 15-105

IN THE

Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

Brief of The Catholic Benefits Association and The Catholic Insurance Company, as *amici curiae* in support of Petitioners

L. MARTIN NUSSBAUM
Counsel of Record
ERIC N. KNIFFIN
IAN S. SPEIR
Lewis Roca Rothgerber LLP
90 S. Cascade Ave.
Suite 1100
Colorado Springs, CO 80903
mnussbaum@lrrlaw.com
(719) 386-3000
Counsel for *Amici Curiae*

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INTERESTS OF AMICI CURIAE[1]

Amici are **The Catholic Benefits Association** ("CBA") and its wholly-owned subsidiary, **The Catholic Insurance Company** ("CIC"). The CBA is an Oklahoma non-profit limited cooperative association committed to assisting its Catholic employer members in providing health coverage to their employees consistent with Catholic values. The CBA provides such assistance through its website, training webinars, legal and practical advice for member employers, and litigation services protecting members' legal and conscience rights. One example of such services is the CBA's white paper on "The Mechanics and Effects of the Accommodation" published on its website at http://www.catholicbenefitsassociation.com/cbn/en/resources/effects-of-accommodations-exhibits.pdf. The CBA's 707 member-employers include Catholic dioceses, schools, colleges, social services agencies, hospitals, senior housing, and closely held for profit employers. One of the conditions of membership is that the member must affirm that its health care coverage complies with Catholic values.

The CIC provides stop-loss insurance and arranges for provider networks and third party administration for CBA members with self-funded plans.

Because of the CBA's and the CIC's daily interactions with health care insurers, benefits

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[1] The parties' counsel were timely notified of and consented to the filing of this brief. Neither a party nor its counsel authored this brief in whole or in part. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief.

consultants, third party administrators, and many types of Catholic employers, they have developed substantial familiarity with the Affordable Care Act, its mandate that employer plans must include coverage for contraceptives, abortion-inducing drugs and devices, sterilization, and related counseling ("CASC Mandate"), the religious employer exemption, the so-called accommodation, the ruinous fines for violation of the Mandate, ERISA, and other federal laws.

The CBA's bylaws require it to have "an Ethics Committee comprised of the Catholic bishops serving on [its] board plus any additional number of Catholic bishops as appointed by the committee." This committee has exclusive authority to determine that the CBA's and the CIC's benefits, products, and services conform to Catholic values and doctrine. Its members, from inception to today, are the Catholic archbishops of Baltimore, Oklahoma City, Philadelphia, and Seattle.

On September 12, 2014, shortly after the government adopted its "augmented accommodation," the CBA Ethics Committee unanimously approved this resolution:

> That the use of contraceptives, abortion-inducing drugs and devices, sterilization, and counseling in support of such options ("CASC services") is contrary to Catholic values. A Catholic employer, therefore, cannot, consistent with Catholic values, comply with the government's CASC mandate, with the accommodation provided to "eligible employers," or with the "augmented accommodation"—unless such an employer

has exhausted all alternatives that do not effect a greater evil and unless such an employer has taken reasonable steps to avoid giving scandal.

SUMMARY OF ARGUMENT

Imagine a law that requires a property owner, in time of war, to unlock his or her gate so soldiers can enter the property to launch artillery at the enemy. One such owner is a Jehovah's Witness who, for religious reasons, objects to this and to the conscription of his or her property in service to the war effort. In response, the government, purporting to accommodate the property owner, offers this: instead of unlocking the gate, the Witness must give the key to a neighbor, and the neighbor is required to open the gate. Would this satisfy the property owner's conscience? Of course not. Most Jehovah's Witnesses "conscientiously object to serving in the military, or in any civilian capacity which fosters or supports the military."[2] Even under the offered "accommodation," the Witness still must hand over his key, and his property is still commandeered for the purpose of killing human beings.

The central premise of the Court of Appeals decisions to date is that the accommodation separates the religious employer from the delivery of CASC benefits to employees and puts the duty to cover those benefits on someone else. The courts characterize the accommodation as an "opt out," and

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[2] See Center on Conscience and War, *Jehovah's Witnesses*, http://www.centeronconscience.org/component/content/article.html?id=225:jehovahs-witnesses.

as the Tenth Circuit put it, "opting out . . . relieves [employers] from complicity." *Little Sisters of the Poor* v. *Burwell*, Nos. 13-1540, 14-6026, 14-6028, 2015 WL 4232096 at *16 (10th Cir. July 14, 2015). But the premise is fundamentally flawed. The accommodation is not an opt out, and under both the original mandate and the regulatory "accommodation," the employer remains inextricably tied to the delivery of CASC benefits.

The reason lies in the ACA. The ACA imposes its Mandate on an employer's "group health plan." Under federal law, employee benefits plans, including group health plans, belong to the employer. It is the employer's plan, established and maintained for the benefit of the employer's employees. ERISA sets forth what a plan is, how it is established, and how it is operated. Critically, ERISA makes clear that it is only the employer who can establish a plan, define its basic terms, and subsequently amend it. Church plans that are exempt from ERISA operate no differently.

The ACA statutory mandate, coupled with HRSA's guidelines, requires each petitioner's "group health plan" to cover CASC services. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) establishes that this mandate, standing alone, imposes a substantial burden on petitioners' religious exercise. But the Department of Justice has argued, and the Courts of Appeals have accepted, that the accommodation removes this obligation from the petitioner-employers and places it on a third party—a third party administrator ("TPA"). That is simply wrong. The accommodation does not operate that way. Indeed, it cannot. Under the ACA, the only way employees have access to CASC benefits is

through their employer's plan. Although the accommodation may shift to a third party the duty to pay for these benefits, the fundamental obligation to provide the benefits remains on the employer, and more precisely, on the employer's plan. Employees have access to CASC benefits only because they are participants in the plan, and they cease to have access when they cease to be participants (e.g., when their employment ends). Furthermore, insurers and TPAs become obligated to pay for CASC benefits under the accommodation only because they have preexisting contractual or fiduciary obligations to the plan.

The plan, then, is central to the ACA's mandate scheme. The employer establishes a group health plan, the ACA requires the plan to cover CASC services, and the accommodation does nothing to alter that requirement. Even if an employer invokes the accommodation, employees will receive CASC benefits because they participate in the plan, and third parties must pay for those benefits because of their relationship to the plan.

Petitioners here are saying: this is too much. Catholic and evangelical Protestant employers object to both the statutory mandate and the regulatory accommodation on grounds of moral complicity. In their view, the government has co-opted something they established and maintain for the good of employees into vehicles for the delivery of items they find morally evil.

And the accommodation, far from relieving employers of this complicity, worsens it. The original accommodation requires an employer to execute a document called EBSA Form 700. Buried in the final

sentence of the form are these words: "This form . . . is an instrument under which the plan is operated." After the August 2014 "augmentation" of the accommodation, employers are now told that either "[t]his form or a notice to the Secretary [of HHS] is an instrument under which the plan is operated." See *infra*, Appendices at 3a, 7a.

This concept—a "plan instrument"—originates in ERISA. ERISA requires all plans to be "established and maintained pursuant to a written instrument." 29 U.S.C. § 1102(a)(1). That instrument must also specify the formal procedures for amending the plan and the person with authority to make such amendments. Under ERISA, only the employer or its designee can execute the plan instruments necessary to establish or amend a plan. The government cannot do this for an employer. That is why, under the "accommodation," the government informs employers that, whether they send the form to their TPA or a notice to HHS, they are creating a new plan instrument. Such a notice is a plan modification masquerading as an opt out.

For the accommodation to comply with the ACA, the government had to find some way to cause the employer to amend its plan to cover CASC services. That is the hidden purpose and actual legal effect of the notice to the TPA. The government has never been forthright about this in its briefing to the Courts of Appeals, and the Courts of Appeals have ignored it entirely. Indeed, Judge Posner, author of the first Court of Appeals decision, bends over backwards to avoid these inconvenient facts. In *Wheaton College* v. *Burwell*, 791 F.3d 792, 800 (7th Cir. 2015), he invents a concept he calls a "governmental plan instrument" and suggests that,

when an employer invokes the accommodation, "[w]hat had been [the employer's] plan, so far as emergency contraception was concerned, the Affordable Care Act ma[kes] the government's plan." Even the government has not gone that far. Nothing in the ACA authorizes the government to do what Judge Posner suggests, and it is simply not the law.

Because the CASC Mandate operates on the employer's plan, the petitioner-employers here are inextricably linked to the delivery of CASC services to their employees, even under the accommodation. And because petitioners' faith teaches that their health plans cannot be made the vehicles for delivering such services, the CASC Mandate imposes a substantial burden on their religious exercise. The Courts of Appeals have fundamentally erred by misunderstanding this; by ignoring the ACA's plan-centric mandate scheme; and by finding that the line the petitioners "drew was an unreasonable one." See *Hobby Lobby*, 134 S. Ct. at 2778 (quoting *Thomas* v. *Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 715 (1981)) (internal quotation marks omitted). This Court's review is therefore critical. These errors must be corrected, and this burden on petitioners relieved.

ARGUMENT

I. This case is extraordinarily important because its resolution will help resolve an unprecedented conflict between the government and a large segment of the religious community.

Never in American history have so many ministries concluded that compliance with a

government regulation so burdens their religious exercise that they must seek judicial protection of their religious liberty. To date, there are at least fifty-seven lawsuits filed—including two by *amici*—seeking relief for Catholic and evangelical Protestant ministry employers.[3] In the two cases brought by *amici* alone, the religious liberty interests of over 700 Catholic employers are at stake.

The large number of cases bear witness to the burden the CASC Mandate and the accommodation place on these ministries' religious exercise. They also point to the fact that the initial decision of the Seventh Circuit infected the analysis and holdings of other Courts of Appeals, including the Tenth Circuit, on an important question of federal law that has now been repeatedly decided in conflict with federal statutes and the decisions of this Court.

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[3] See The Becket Fund, *HHS Mandate Information Central*, http://www.becketfund.org/hhsinformationcentral/.

II. The Courts of Appeals fundamentally misunderstand how the accommodation commandeers ministries' plans.

A. The Courts of Appeals have incorrectly concluded that the accommodation works independently of employers' group health plans.[4]

The appellate decisions denying that the accommodation burdens the religious exercise of self-funded ministry employers rest on the unfounded assertion that, after a self-insured employer submits the form or notice, the government has authority to require a TPA to deliver CASC services outside the objecting employer's group health plan.

The most aggressive proponent of this position is Judge Posner, who has authored all three accommodation decisions in the Seventh Circuit.[5] The Seventh Circuit was the first to label the accommodation an "opt out," *Notre Dame I*, 743 F.3d

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[4] *Amici*'s analysis here focuses exclusively on the burden the CASC Mandate imposes on employers like the Little Sisters of the Poor with self-funded plans. To the extent that the Mandate also falls on "health insurance issuer[s]," it burdens the religious exercise of employers buying group insurance by depriving them of any option that excludes CASC services. See, e.g., *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925) (law effectively foreclosing option of private school education violates fundamental right of parents); *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (federal statute that prohibits importation of drink used by religious group violates Religious Freedom Restoration Act).

[5] *Univ. of Notre Dame* v. *Sebelius*, 743 F.3d 547 (7th Cir. 2014) ("*Notre Dame I*"), *vacated and remanded*, 135 S. Ct. 1528 (2015); *Univ. of Notre Dame* v. *Burwell*, 786 F.3d 606 (7th Cir. 2015) ("*Notre Dame II*"); *Wheaton Coll.*, 791 F.3d 792.

at 550, a phrase invoked repeatedly by five other circuits.[6]

Judge Posner called the accommodation an "opt out" because, under his reading, the government can compel a TPA to provide CASC coverage independently of the objecting employer's group health plan and, therefore, without burdening the employers' religious exercise. Notre Dame argued that its plan remained a "conduit" of contraception coverage, but the Seventh Circuit said no: "under the [Affordable Care] Act the government . . . uses private insurance providers and health plan administrators as its agents to provide medical services. . . ." *Notre Dame II*, 786 F.3d at 615. It is "the federal government" that "determines (enlists, drafts, conscripts) substitute providers." *Id.* at 614. "*This coverage is separate from Notre Dame*," Judge Posner said, and "the university has stepped aside." *Id.* at 612.

This novel theory is developed further in Judge Posner's *Wheaton College* decision: "What had been Wheaton's plan, so far as emergency contraception was concerned, the Affordable Care Act made the government's plan when Wheaton refused to comply with the Act's provision on contraception coverage." *Wheaton Coll.*, 791 F.3d at 800. Under the accommodation, the Seventh Circuit asserts, "new

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[6] *Little Sisters of the Poor*, 2015 WL 4232096, *passim* (44 times); *Priests For Life* v. *U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 235 (D.C. Cir. 2014); *Geneva Coll.* v. *Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 438 (3d Cir. 2015); *Catholic Health Care Sys.* v. *Burwell*, ___ F.3d ___, 2015 WL 4665049, at *2 (2d Cir. Aug. 7, 2015); *Mich. Catholic Conference* v. *Burwell*, Nos. 13-2723, 13-6640, slip op. at 17 (6th Cir. Aug. 21, 2015).

contracts are created," through "governmental plan instrument[s],"[7] "to which [objecting employers are] not a party." *Id.* at 796, 800. Because the CASC coverage is supposedly provided through the "government's plan," we are told "the government isn't using the college's plans" at all. *Id.* at 800-01. Judge Posner pronounces these conclusions without legal support.

Other courts have followed the Seventh Circuit down this path, uncritically accepting the notion that the government can compel delivery outside objecting employers' group health plans. See, e.g., *Priests for Life*, 772 F.3d at 253 ("[C]ontraceptive services are not provided to women because of Plaintiffs' contracts with insurance companies . . . ."); *Geneva Coll.*, 778 F.3d at 438 n.13 (the provision of contraceptive coverage under the accommodation "is not dependent upon Geneva's contract with its insurance company"); *E. Tex. Baptist Univ.* v. *Burwell*, __ F.3d __, 2015 WL 3852811 at *7 (5th Cir. June 22, 2015) ("The government is requiring . . . third-party administrators to offer [CASC coverage] separately from the plans . . . ."); *Mich. Catholic Conference*, Nos. 13-2723, 13-6640, slip op. at 17 ("[T]he eligible organization's health plan does not host the coverage.").

The Tenth Circuit, also invoking no legal authority for its conclusions, has joined the appellate chorus, holding that, under the accommodation, the Little Sisters of the Poor's "only involvement in the scheme is the act of opting out"; that the

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[7] The phrase "governmental plan instrument" does not appear in federal law or regulations and has never before appeared in a published court opinion.

accommodation "shift[s] responsibility to non-objecting entities"; and that "[o]pting out ensures they will play no part in the provision of contraceptive coverage." *Little Sisters of the Poor*, 2015 WL 4232096 at *24, *30.

In finding that the accommodation causes a TPA to provide CASC coverage outside the employer's plan, the Tenth Circuit and the other Courts of Appeals have fundamentally misunderstood the plan-centric character of the CASC Mandate and ERISA.

B. The ACA imposes the CASC Mandate on employer's group health plans.

The ACA imposes the CASC Mandate[8] on "group health plans."[9] 42 U.S.C. § 300gg-13(a)(4). The HHS, IRS, and DOL regulations do so as well.[10]

It is critical to understand that only employers can establish and maintain group health plans. The Public Health Service Act ("PHS Act") defines "'group health plan' as an *employee* welfare benefit plan [as defined in ERISA § 3(1), codified at 29 U.S.C. § 1002(1)] to the extent that the plan provides medical care . . . to *employees* or their dependents." 42 U.S.C. § 300gg-91(a)(1) (emphases added).

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[8] The statute refers to "preventive care and screening for women . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." The HRSA subsequently defined such preventive care as including CASC services.

[9] While the ACA also imposes the CASC Mandate on "health insurance issuer[s]," that portion of the Mandate is not at issue here. See *supra* note 4.

[10] 45 C.F.R. § 147.130(a)(1)(iv); 26 C.F.R. § 54.9815-2713T(a)(1)(iv); 29 C.F.R. § 2590.715-2713(b)(1).

ERISA governs "*employee* welfare benefit plans," which it defines as "any plan, fund or program . . . established or maintained *by an employer* . . . for the purpose of providing for its participants or their beneficiaries . . . medical . . . care or benefits." 29 U.S.C. § 1002(1) (emphases added).

The Internal Revenue Code ("Code") similarly defines a group health plan as "a plan (including a self-insured plan) of, or contributed to by, an *employer* . . . to provide health care (directly or otherwise) to the *employees*, former *employees*, . . . or others associated or formerly *associated with the employer*." 26 U.S.C. § 5000(b)(1) (emphases added).

Because only employers have group health plans, the penalty for failing to comply with the CASC mandate—$36,500 per covered employee per year—is imposed on the employer that maintains a CASC-free "group health plan." 26 U.S.C. § 4980D(a), (b)(1), (e)(1). Because delivery of CASC services can be accomplished only through an employer's plan, the accommodation regulation requires self-insured employers to "contract[] with one or more third party administrators" that will serve as the employer's surrogate in providing the services the employer considers morally objectionable. See 26 C.F.R. § 54.9815-2713A(b)(1)(i). Absent an employer in continuing contractual relationship with a TPA, no accommodation is possible because there is no one to receive the Form 700 or the notice from DOL and no one to provide CASC coverage.[11]

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[11] One of the oddest provisions in the ACA regulations suggests the government's solicitude for the conscience of TPAs. The regulations permit a TPA to walk away from its contractual obligation to an employer upon learning that it must provide

The availability of CASC coverage begins and ends with an employee's employment relationship. The employer has no obligation to provide CASC coverage to employees or their dependents who do not enroll or sign up in the plan. The employer's only obligation runs to those on its plan. Meanwhile, the TPA has duties only to those on the plan it administers. This obligation is entirely derivative of the plan and employment relationships. Thus, in order for the accommodation to accomplish its basic purpose, the employer must amend its own plan and thereby command its own TPA to provide its own employees with CASC services under its own plan. Under the accommodation, it is the employer's plan, and not a government plan, that provides CASC coverage.

Congress, through the ACA, and the executive branch through HHS, DOL, and IRS (collectively, "Departments") through regulations, impose the CASC Mandate on employers with respect to their group health plans. Nothing in the statutes or regulations grants individuals the right to obtain ACA-mandated CASC services other than through their employers' plans, and none of these laws gives

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CASC services. See 26 C.F.R. § 54.9815-2713A (effective September 14, 2015) (TPA has an option whether "to remain in a contractual relationship with an eligible organization" after receiving the accommodation notice). This means that if a TPA abandons its contract, the employer must, to avoid huge fines, recruit a replacement TPA that is willing to arrange CASC services. The new TPA does this under the employer's plan that is co-opted under the accommodation. The requirement that the employer recruit a TPA with different religious values than the employer is itself another burden on the employer's religious exercise.

the government authority to provide CASC services other than through an employer's group health plan.

C. Only the employer can adopt or modify its group health plan and determine the plan administrator.

Under ERISA, only an employer can control a plan's basic terms. It is the exclusive role of the employer, as plan sponsor, to create an employee benefit plan by establishing a written instrument that sets out a plan's "basic terms and conditions." *Cigna Corp.* v. *Amara* 131 S. Ct. 1866, 1877 (2011) (citing 29 U.S.C. §§ 402, 1102); see also *US Airways, Inc.* v. *McCutchen*, 133 S. Ct. 1537, 1548 (2013) ("[ERISA] is built around reliance on the face of written plan documents."). Under ERISA, the employer must explain in this document how it will amend its plan. *Cigna Corp.*, 131 S. Ct. at 1877. These amendment procedures "must be followed for the valid adoption of an amendment." *Overby* v. *Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010) (citing *Curtiss-Wright Corp.* v. *Schoonejongen*, 514 U.S. 73, 85 (1995)). Statements in documents not issued by the plan sponsor "do not themselves constitute the terms of the plan." *Cigna Corp.*, 131 S. Ct. at 1878 (emphasis omitted).

ERISA is equally clear that only the employer has authority to designate a plan administrator. See ERISA § 3(16), codified at 29 U.S.C. § 1002(16). The plan administrator is the person "so designated" in the plan instrument described above. *Id.* § (16)(A)(i).[12] Congress has specified that the

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[12] If the plan instrument is silent on this matter, the plan sponsor (employer) holds this responsibility by default. *Id.* § (16)(A)(ii).

Secretary of Labor may overrule this designation only if the plan sponsor "cannot be identified." *Id.* § (16)(A)(iii).[13]

The regulations establishing the accommodation acknowledge these limitations on the Departments' powers. Nowhere do the Departments claim the statutory authority to compel CASC coverage outside an employer's own plan. To the contrary, both the July 2013 regulation that establishes the original accommodation and the July 2015 regulation that finalizes the augmented accommodation confirm that the accommodation works by commandeering the employer's own plan and obligating that plan to provide CASC services.[14]

In its original form, the accommodation requires the employer to execute a government-supplied form and deliver it to its TPA.[15] By doing so, the legal duty to provide CASC services, the government now argues, shifts away from the employer to its TPA, but that duty remains squarely on the employer's own plan.

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[13] Such a plan is called an "orphan plan." See DOL, *Report of the Working Group on Orphan Plans* (Nov. 8, 2002), http://www.dol.gov/ebsa/publications/AC_110802_report.html.

[14] Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,879 (July 2, 2013) ("participants . . . in a self-insured plan of an eligible organization" receive CASC services); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,328 (July 14, 2015) ("[P]lan beneficiaries and enrollees should not be required to . . . enroll in new programs or to surmount other hurdles to receive access to coverage.")

[15] 26 C.F.R. § 54.9815–2713 (IRS); 29 C.F.R. § 2590.715–2713A (DOL); 45 C.F.R. § 147.131 (HHS).

The Departments' regulations acknowledge that, even after the accommodation, the plan remains the employers' plan. Through the accommodation, the TPA "becomes an ERISA section 3(16) plan administrator . . . in a self-insured plan *of an eligible organization*." 78 Fed. Reg. at 39,879 (emphasis added). The TPA becomes an administrator under ERISA section 3(16)(A)(i), *id.*, which means it is designated as such "by the terms of the instrument under which the plan is operated," ERISA § 3(16)(A)(i). The Departments' final regulation candidly acknowledges that the TPA is using the platform of the accommodated employer to provide the CASC services. It states that the employer's TPAs are "already paying for other medical and pharmacy services," that any other provider would "lack the coverage administration infrastructure to verify the identity of women in accommodated health plans," and that plan participants "should not be required to enroll in new programs . . . to receive access to coverage."[16]

Because the regulators understood these legal principles, they crafted their EBSA Form 700 to function as a plan amendment masquerading as an opt out. DOL's regulation declares that the self-certification form "is one of the instruments under which *the plan* is operated under ERISA section 3(16)(A)(i)." 29 C.F.R. § 2510.3-16 (emphasis added). And the very last line on the back of that form surrenders the pretense of being an "opt out." It informs the employer and TPA: "This form is an instrument under which *the plan* is operated." EBSA Form 700 (rev. July 2013) (emphasis added).

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[16] 80 Fed. Reg. at 41,328.

There is no doubt that the plan amended is the employer's own plan. Contrary to Judge Posner's theory, *supra* at 6-7, 9-11, the Departments admit the accommodation does not create "two separate health insurance policies." 78 Fed. Reg. at 39,876. Thus, in order for the accommodation to accomplish its basic purpose, the employer must amend its own plan and thereby command its own TPA to provide its own employees with CASC services under its own plan. Any other approach is simply not authorized by federal law.

The augmented accommodation is no different. It operates under the same law and is, therefore, subject to the same constraints. Like the original accommodation, the augmented accommodation makes the TPA a plan administrator under ERISA section 3(16)(A). 80 Fed. Reg. at 41,323. The Departments equivocate on whether it is the employer's notice to HHS or DOL's notice to the TPA that serves as the plan instrument that ERISA section 3(16)(A)(i) requires.[17] But even as DOL claims its "broad rulemaking authority" includes the ability to interpret ERISA section 3(16) contrary to its express terms, it never asserts power to compel a TPA to act outside the employer's plan. In the end, it still acknowledges that "DOL notification" is "an instrument under which *the plan* is operated." 80 Fed. Reg. at 41,323 (emphasis added).

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[17] Compare EBSA Form 700 (rev. Aug. 2014) ("*[A] notice to the Secretary* is an instrument under which the plan is operated." (emphasis added)), with 80 Fed. Reg. at 41,323 ("*The DOL notification* will be an instrument under which the plan is operated. . . ." (emphasis added)).

The Departments' accommodation requires that CASC services be delivered through objecting employers' group health plans because the Departments have no other option under the law. Only group health plans can be obligated to provide CASC services, and only employers can establish, maintain, and amend these plans. Bowing to these statutory constraints, the Departments' regulations concede that the accommodation uses the employer's own plan for the delivery of CASC services. The accommodation thus hijacks the objecting employer's own group health plan to provide CASC services contrary to the employer's moral convictions, imposing a substantial burden on the employer's religious exercise.

III. The First Amendment precludes the courts from second-guessing the ministries' moral judgment.

It is remarkable that seven United States Courts of Appeals have held that, because of the availability of the so-called accommodation, the CASC mandate does not substantially burden the religious exercise of ministry employers—even while an historic number of these employers have concluded that complying with the accommodation is forbidden by their religion. These ministries have found the Mandate so morally intolerable that they filed almost sixty lawsuits praying for the courts to protect their religious liberty.

The moral assessments of these religious employers are not casual. Indeed, each has, as a matter of conscience, risked imposition of ruinous fines if judicial relief is denied. In making their own moral assessment, *amici* formally convened their

Ethics Committee. The four Catholic archbishops comprising this committee together have almost thirty years of advanced theological education and over seventy years of episcopal leadership experience. After being advised by legal counsel and consulting with moral theologians, the committee members unanimously approved the resolution determining that Catholic employers "cannot, consistent with Catholic values, comply with the government's CASC mandate, with the accommodation provided to 'eligible employers,' or with the 'augmented accommodation.'" See *supra* at 2-3.

Most of the Circuits, like the Tenth, see *Little Sisters of the Poor*, 2015 WL 4232096 at *18, acknowledge that *Hobby Lobby* and *Thomas* v. *Review Board* preclude them from assessing the plausibility of petitioners' religious claims. *See Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say their religious beliefs are mistaken or insubstantial. Instead, 'our narrow function . . . is to determine' whether the line drawn reflects 'an honest conviction.'" (quoting *Thomas* v. *Review Board*, 450 U.S. at 716)). They insist that, while they would not do this, it remains their role to assess how the CASC Mandate and accommodation rules work. "[T]he courts[,] not plaintiffs," they say, "must determine if a law or policy substantially burdens religious exercise." See *Little Sisters of the Poor*, 2015 WL 4232096 at *18.

But the Circuits drew legal conclusions about the workings of the accommodation without consideration of most of the law cited in this brief. They concluded, contrary to that law, that the

accommodation was a mere "opt out" that divorced the delivery of CASC services from the ministries' group health plans. It simply is not so. Ministries have made their moral judgment that they cannot participate in this system. Under the guise of pronouncing "how the law works," the Courts of Appeals are really saying, "We have looked at this, and it really does not violate the ministries' religion because it works differently." But *Hobby Lobby* says that is not the role of the courts. The Little Sisters of the Poor and the other ministries have come to the moral conclusion that they cannot sign the forms or participate in this system. The courts cannot tell them they are wrong about whether that action is forbidden, even under the guise of claiming to tell them how the law works.

CONCLUSION

For these reasons, the Catholic Benefits Association and the Catholic Insurance Company pray that this Court grant certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

L. MARTIN NUSSBAUM
Counsel of Record
ERIC N. KNIFFIN
IAN S. SPEIR
Lewis Roca Rothgerber LLP
90 S. Cascade Ave., #1100
Colorado Springs, CO 80903

Counsel for *Amici Curiae*
August 24, 2015

APPENDICES

EBSA FORM 700—CERTIFICATION

(To be used for plan years beginning on or after January 1, 2014)

This form is to be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131.

Please fill out this form completely. This form must be completed by each eligible organization by the first day of the first plan year beginning on or after January 1, 2014, with respect to which the accommodation is to apply, and be made available for examination upon request. This form must be maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify that on account of religious objections, the organization opposes providing coverage for some or all of any contraceptive services that would otherwise be required to be covered; the organization is organized and operates as a nonprofit entity; and the organization holds itself out as a religious organization.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (each within the meaning of section 52(a) or (b) of the Internal Revenue Code), may certify that it holds itself out as a religious organization.

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer(s) (for insured health plans) or a third party administrator(s) (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a plan's third party administrator that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that:

(1) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

This form is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0938-XXXX. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: CMS, 7500 Security Boulevard, Attn: PRA Reports Clearance Officer, Mail Stop C4-26-05, Baltimore, Maryland 21244-1850.

EBSA FORM 700—CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR

2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of

this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulationsand-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.